Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Implementation of Section 703(e)	)	**CS Docket No. 97-151**
Of the Telecommunications Act	)	
Of 1996	)	
	)	
Amendments of the Commission's Rules	)	
And Policies Governing Pole Attachments	)	

To the Commission:

JOINT COMMENTS OF THE EDISON ELECTRIC INSTITUTE AND UTC, THE TELECOMMUNICATIONS ASSOCIATION

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SUMMARY

The FCC has adopted the current *NPRM* to implement new Section 224(e) of the Pole Attachment Act as amended by the Telecommunications Act of 1996. Section 224(e) requires the FCC to adopt a new set of rules governing rates, terms and conditions for attachments to utility poles, ducts, conduits and rights-of-way by telecommunications carriers when the parties fail to resolve a dispute over such charges. In their joint comments on behalf of the electric utility industry, EEI and UTC urge the FCC to embrace the opportunity to take a "fresh look" at the regulation of pole attachments in a manner that balances the competing interests of telecommunications carriers and utility pole owners, customers and shareholders. Old assumptions about the ability of utilities to absorb additional costs and burdens are outdated. The utility industry is currently under-going dramatic restructuring in which competitive pressures have eliminated any margin to withstand the subsidization of other industries.

The FCC should abandon its historic reliance on rigid formulaic pole attachment rules and instead rely on the use of market forces and good faith negotiations between the parties as the best means to carry out the intent of Congress. Consistent with having negotiations as the primary means of establishing pole attachment agreements the FCC must explicitly recognize that the Section 224(f) non-discriminatory access provision does not require that the rates, terms and conditions of pole attachment agreements between a utility and all attaching entities be identical. The rules should allow for a range of acceptable rates a utility may charge for the pole attachment depending on the specific terms and conditions that the parties freely negotiate. Further, once an agreement is mutually reached between the two entities it should be binding and attaching parties should not have the right to use the FCC to improve or eliminate terms or conditions that they freely negotiated.

Section 224(e)'s new formula embodies a fundamental shift in the allocation of attachment costs from an incremental approach to a fully-allocated cost approach that attempts to recognize that all attaching entities equally benefit from the existence of the pole. To the extent that the parties fail to reach an agreement the FCC should utilize forward looking pricing methodologies in order to establish costs for access to utility facilities that approximates the actual value of the facilities under market conditions. Further, the Act clearly indicates that after 2001 a cable company is only entitled to the old incremental rate formula if the attachment is used "solely to provide cable services." Thus, the use of a cable company's pole attachments to provide non-video services would mean that the attachment is not used to "solely to provide cable services" and would at a minimum trigger the new fully-allocated cost formula of section 224(e). Telecommunications carriers should not be permitted to overlash their existing lines with additional fiber absent a separate pole attachment agreement or permission from the utility. The overlashing of existing facilities absent a valid agreement with a utility constitutes nothing less than trespass. Overlashing often has a significant impact on the pole and the utility as the pole owner. Each entity subject to an attachment fee as a result of overlashing should also be counted as an attaching entities for purposes of determining the allocation of the non-usable space on a pole. The provision of dark fiber from within an existing attachment does not constitute a new attachment under the Act.

EEI and UTC adamantly oppose the FCC's tentative conclusion that the 40-inch safety space emanates from a utility's requirement to comply with the NESC and should properly be assigned to the utility as part of its usable space. The safety space comes from the need to protect communications workers from electric lines. It would not exist but for the presence of telecommunications cables and their workers on utility poles. If not assigned as usable space to

cable and telecommunications companies, EEI and UTC recommend that at a minimum that the safety space be considered as "other than usable space" and be apportioned equally among all of the attaching entities.

The Act requires that the common "non-usable" space on a pole be apportioned among all attaching entities. EEI and UTC agree with the FCC's conclusion that the apportionment of common costs is expressly limited to those entities obtaining pole attachments to provide "telecommunications services," and therefore does not include electric utility attachments that are used to provide electricity. Nor does the Act apply to non- telecommunication service attachments by governmental entities. Finally, because ILECs are not "attaching entities" under the statute it is appropriate that they not also be counted in the two-thirds apportionment. EEI and UTC support the FCC's recommendation that each utility develop, through the information it possesses, a presumptive average number of attachers on its poles.

The FCC must recognize the inherent operational differences between electric utility ducts and conduits and telecommunications ducts and conduits. Electric conduits have specific safety and reliability considerations that warrant special caution by the Commission in its application of the provisions of Section 224. Any calculation of a just and reasonable conduit rate must be based on a conduit system including ducts, conduit, cement or other encasement materials, vaults, handholes, manholes and other related equipment that allow for deployment of, access to, and maintenance of cable facilities. The FCC's proposed half-duct methodology is wholly inappropriate for the pricing of access to electric utility conduit. Rates for the use of right-of-way which the utility owns in fee should be based on a negotiated amount or on the eminent domain compensation standard used in the particular state if negotiations fail.

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JOINT COMMENTS OF
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UTC, THE TELECOMMUNICATIONS ASSOCIATION

Pursuant to Section 1.415 of the Commission's Rules, the Edison Electric Institute (EEI) and UTC, The Telecommunications Association,[1] hereby respectfully submit the following comments on the FCC's *Notice of Proposed Rulemaking* (*NPRM*), FCC 97-234, released August 12, 1997, in the above-captioned matter regarding the adoption of final rates, terms and conditions governing pole attachments.

EEI is the association of the United States investor-owned electric utilities and industry associates worldwide. EEI's U.S. members serve 99 percent of all customers served by the shareholder segment of the U.S. industry. As of October 1995, EEI's members generated approximately 79 percent of all the electricity generated by electric utilities, and serviced 76 percent of all ultimate customers in the nation. EEI frequently represents its U.S. members before Federal agencies, courts, and Congress in matters of common concern.

[1] UTC was formerly known as the Utilities Telecommunications Council.

UTC is the national representative on telecommunications matters for the nation's electric, gas and water utilities, and natural gas pipelines. Over 1,300 such entities are members of UTC, including investor-owned utilities, municipal electric systems, rural electric cooperatives, and natural gas distribution and transmission companies.

As the principal representatives of the utilities directly impacted by the Commission's interpretation and implementation of the Pole Attachment Act, 47 U.S.C. Section 224, as amended by the Telecommunications Act of 1996, EEI and UTC have participated in every phase of the FCC's interrelated pole attachment proceedings and are pleased to offer the following comments on the current rulemaking.

I. Introduction

The FCC has adopted the current *NPRM* to implement the provisions contained in new Section 224(e), which directs the Commission to prescribe regulations to govern charges for attachments to utility poles, ducts, conduits and rights-of-way by telecommunications companies when the parties fail to resolve a dispute over such charges.

At the outset in attempting to implement these provisions the FCC must recognize that utilities design, own and maintain poles and other distribution facilities as an integral part of their obligation to provide reliable, safe and affordable electric service to the public. Old assumptions about the ability of utilities to absorb additional costs and burdens are outdated. The utility industry is currently under-going dramatic restructuring in which competitive pressures have eliminated any margin to withstand the subsidization of other industries. The utility industry's deregulation and restructuring will have a dramatic impact on all segments of society and is roughly equivalent to what would have happened if the break-up of AT&T and the passage of the Telecommunications Act of 1996 had occurred simultaneously. Just as the FCC has been wrestling with access charge

reforms and universal service mandates, so too is the utility industry grappling with the best manner to implement competition in an environment that has potential stranded investment costs that dwarf anything contemplated by the telecommunications industry.

The Commission must therefore temper its natural impulse to adopt an overly broad interpretation of its authority that would unduly favor its primary constituency – cable and telephone companies – at the expense of utility customers and shareholders. Instead, the FCC should exercise self-restraint and rely to the greatest extent possible on the use of market forces to establish the rates, terms and conditions of pole attachment agreements. Where the parties are unable to reach an agreement the FCC should adopt an approach that balances the interests of all stakeholders. EEI and UTC believe the use of forward looking costing methodologies is the best manner to achieve this goal since it approximates the actual value of the facilities under market conditions.

II. TRANSMISSION TOWER AND WIRELESS ATTACHMENTS ARE OUTSIDE THE SCOPE OF THIS PROCEEDING

As with the recently submitted Joint EEI/UTC Comments and Reply Comments on the pending interim pole attachment rate *NPRM*, CS Docket No. 97-98,[2] EEI and UTC do not intend to address in this proceeding the issue of telecommunications attachments to utility transmission towers or wireless attachments in general because both of these issues are outside the scope of the current *NPRM* and the FCC's authority. Adoption of rules concerning rates for attachments to transmission towers or by wireless services generally in the context of this rulemaking would be wholly inappropriate.

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[2] Joint EEI/UTC Comments and Joint EEI/UTC Reply Comments filed in CS Docket No. 97-98 on June 27, 1997 and August 11, 1997 respectively.

Attachments to transmission towers and wireless attachments should not be addressed by the Commission in this proceeding for the following reasons. The Commission has not raised the issue of attachments to transmission towers or attachments by wireless carriers in the *NPRM* and therefore a full and complete record will not be developed on which the Commission will be able to make an informed decision. More importantly, the utility industry questions the fundamental issue of whether the FCC has the authority to regulate access to utility transmission structures or wireless attachments. EEI and UTC, as well as other utility representatives have filed petitions for reconsideration of the FCC's *First Report and Order* in CC Docket 96-98 regarding this issue. Pending the outcome of those petitions, EEI and UTC urge the FCC to refrain from taking any further action regarding such attachments. The Act's pole attachment provisions are aimed at facilitating competition in local telephone distribution services. This is precisely why the pole attachment access provisions of Section 224 were incorporated into the interconnection requirements of incumbent local exchange carriers in Section 251(b)(4) of the Telecommunications Act and were implemented by the FCC as part of its "local competition order," CC Docket No. 96-98. Transmission structures are generally located outside of distribution areas and are therefore of little practical value to the goal of advancing competition in local telephone service market.[3] Similarly, it cannot be maintained that wireless carriers require access to utility facilities given the plethora of siting options for such carriers.[4] One need only open the back of any wireless trade publication to see the number of entities that are in the tower siting business, including such entities as Walmart, Motorola and the U.S. Post Office.

[3] The fact that 224 is aimed at incumbent local telephone companies and not the transmission facilities of interexchange companies is instructive on the intent of Congress; the FCC must recognize that unlike the telephone industry, which has been split into local (distribution) and long distance (transmission) companies, the majority of the electric industry is still vertically integrated with the same company owning distribution and transmission facilities.

Finally, it must be recognized that the proposed rate formulas for pole attachments and conduits do not even attempt to account for the far greater costs and operational considerations associated with attachments to transmission towers or for wireless attachments. Indeed, it is instructive to note that the statutory definition of poles, ducts, conduits and rights-of-way, has not been altered since the original Pole Attachment Act of 1978, and yet the FCC has never thought to include in any of its existing or proposed rate formulas the FERC accounts on transmission towers within its presumptions regarding the average costs of poles. The application to transmission facilities of even a properly crafted formula based on distribution facilities would provide grossly inadequate cost-recovery, and clearly would amount to confiscation of property without just compensation. As the New York Public Service Commission recently determined, access to transmission towers is best left to market-based, private negotiations.[5]

III. THE FCC'S RULES MUST ENFORCE AND EXHIBIT A PREFERENCE FOR NEGOTIATED AGREEMENTS

EEI and UTC urge the Commission to rely to the greatest extent possible on arms-length negotiations between the pole owners and attaching entities to establish the terms and conditions of pole attachments. It is an undisputed fact that an underlying goal of the Telecommunications Act is to foster competition first and foremost through reliance on market forces. Again and again the Act demonstrates Congress' preference for the use of negotiations. The FCC must not circumvent the will or intent of Congress by adopting a formulaic tariff-like interpretation of the pole attachment provisions that would eliminate any incentive to engage in meaningful negotiations.

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[4] Recent complaints of wireless carriers as to the difficulties they are having in obtaining siting refer to local government zoning issues and not a lack of suitable siting locations.

[5] *Opinion and Order*, New York Public Service Commission, Opinion No. 79-10 in case No. 95-C-0341, June 17, 1997.

In proposing a methodology to implement Section 224(e), the FCC itself notes that the Commission's role is limited to circumstances "when the parties fail to resolve a dispute over such charges." Accordingly, EEI and UTC strongly endorse the Commission's recommendation that negotiations between a utility and an attaching entity should continue to be the primary means by which pole attachment issues are resolved. Support for this conclusion is bolstered by the explanatory Conference Report accompanying the Act which specifically indicated that 224(e)(1) was added, "to allow parties to negotiate the rates, terms, and conditions for attaching to poles..."[6]

Consistent with the Commission's recommendation that negotiations be the primary means of establishing pole attachment agreements the FCC must explicitly recognize that the Section 224(f) non-discriminatory access provision does not require that the rates, terms and conditions of pole attachment agreements between a utility and all attaching entities be identical. The use of negotiations necessarily requires some differentiation in the terms and conditions depending on what the parties specifically negotiate. The FCC's action on this point should be informed by the Eighth Circuit's recent decision striking down an FCC interpretation of an analogous non-discrimination provision in its *First Report and Order* in the interconnection proceeding, CC Docket 96-98. In *Iowa Utilities Board v. FCC,* the court held that it was not reasonable for the FCC to interpret this term as requiring "most favored nation" treatment among all parties with no variance. The court held that such an interpretation conflicts with the Act's design to promote negotiated binding agreements. The court concluded that the FCC's "pick and choose rule would thwart the negotiation process because the LEC would be reluctant to make concessions on one term in exchange for the benefit of another term if it then faced the prospect

[6] Conference Report to the Telecommunications Act of 1996, S.652, 104th Congress, 2nd Sess., p.70.

of having to offer the same concession to another carrier without receiving any corresponding benefit.

As in the *Iowa Utilities* case, the FCC must recognize and allow for a range of acceptable rates a utility may charge for the pole attachment depending on the specific terms and conditions that the parties freely negotiate. Further, once an agreement is mutually reached between the two entities it should be binding and attaching parties should not have the right to use the FCC to improve or eliminate terms or conditions that they freely negotiated.

EEI and UTC support the FCC's recommendation that an attaching entity must attempt to negotiate and resolve its dispute with a utility before filing a complaint with the Commission. However, in order to give meaning to the requirement that the parties first attempt to negotiate, EEI and UTC recommend that the FCC amend the current rule, which requires a complainant to include a brief summary of all steps taken to resolve its dispute before filing a complaint, by specifically adding a requirement that the parties attempt to negotiate for a certain minimum period of time as evidence of good faith before a party can file a complaint. EEI and UTC recommend that 180 days would be an appropriate minimum period of time. Such a requirement is consistent with the time required for the give and take of real world negotiations, and ensures that utilities are not forced to drop all on-going business in order to respond to an attachment request or else face the possibility of a complaint being filed. In addition, the complainant should be required to document its attempts to negotiate including listings of meetings, correspondence, offers and counter-offers, etc.

IV. THE FCC SHOULD UTILIZE FORWARD LOOKING PRICING

As indicated above, EEI and UTC believe that the Commission's rules should allow for the use of market forces where ever possible to establish pole attachment rates. Accordingly, in establishing a rate formula to act as a backstop when the parties are unable to negotiate a market rate, the FCC should attempt to approximate what would in fact be market rates.

In attempting to implement Section 224(e) the FCC must recognize that the new formula embodies a fundamental shift in the allocation of attachment costs from an incremental approach aimed at bolstering a nascent cable industry to a fully-allocated cost approach that attempts to recognize that all attaching entities equally benefit from the existence of the pole. With this in mind the FCC must not be constrained by the pricing methodologies that were dictated under the old formula. Instead, the Commission should look to the use of economic pricing models that can act as a surrogate for a market rate. Specifically, the FCC should utilize forward looking pricing to determine the costs of facilities. The use of forward looking costs is appropriate as: (1) it recognizes that utilities may not have ready access to accurate historical data; (2) older data does not account for the appreciation of certain assets[7]; and (3) forward looking costs ensure a more equitable return on investment for utility ratepayers and shareholders.

As the Commission is well aware, forward looking pricing has been embraced by the FCC as the proper methodology for determining the pricing of access to local telephone facilities in its interconnection proceeding, CC Docket No. 96-98. In addition, the FCC has specifically indicated its intent to use forward looking pricing for the determination of pole and conduit costs

[7] Some EEI and UTC members have indicated that certain municipalities are attempting to recover the full costs of utilizing city right-of-way. These costs are often not included in the historical costs of public rights-of-way and therefore under a historical cost basis a utility would not be able to recover its true costs from attaching entities.

in the universal service context.[8] It makes little sense to utilize forward-looking pricing for valuing assets owned by telephone companies who are directly competing against attaching entities and yet not apply it to utilities.

V. OVERLASHING AND ATTACHMENT SPACE USE

A. The Provision of Any Service Other Than Cable Television Takes A Cable Company Outside the Realm Of Section 224(d)

The Commission determined in the *Texas Utilities* case that a utility may not charge different pole attachment rates depending on the type of service provided by a cable operator. The Commission found that "Section 224 protects a cable company's pole attachments within its franchise service area which support equipment employed to provide non-video services in addition to video and other traditional cable television services" and that the "imposition of a separate charge for the company's cable system pole attachments for nontraditional services violates Section 224's prohibition against unjust and unreasonable pole attachment rates, terms and conditions."[9] The FCC seeks comment on whether its earlier holding should be extended to other circumstances where utilities attempt to condition or limit the use of attachment space.

The *Texas Utilities* case took place in a pre-Telecommunications Act environment that is no longer applicable. New Section 224(d)(3) clearly indicates that after 2001 a cable company is only entitled to the old incremental rate formula if the attachment is used "solely to provide cable services." Thus, the use of a cable company's pole attachments to support equipment employed to provide non-video services in addition to video would not be used to solely to provide cable

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[8] *Further Notice of Proposed Rulemaking*, Forward-Looking Mechanism for High Cost Support for Non-Rural LECs, CC Docket No. 96-45, released July 18, 1997, para. 104.

[9] See *Heritage Cablevision Assocs. of Dallas, L.P. v. Texas Utils. Elec. Co.*, 6 FCC Rcd. 7099 (1991), recon. denied, 7 FCC Rcd. 4192, aff'd sub nom. *Texas Utils. Elec. Co. v. FCC*, 997 F.2d 925 (D.C. Cir. 1993).

services and would, at a minimum, trigger the new fully-allocated cost formula of section 224(e).[10]

Further, to the extent the FCC is suggesting that it "extend" its holding in the *Texas Utilities* case to "other circumstances where utilities attempt to condition or limit the use of attachment space," the FCC has not identified any such conditions or limitations and it is therefore impossible to comment on this issue. EEI and UTC also caution the FCC not to take specific conditions or limitations out of context of the entire pole attachment agreement in question (or on-going negotiations) as this distorts the reasonableness of these conditions. Again, the FCC should not substitute its judgement as to reasonableness for that of the negotiating parties.

A cable operator is only entitled to the 224(d) rate if it is utilizing its pole attachment solely to provide cable television service. Therefore, to qualify for this rate a cable company should be required to certify that its pole attachments are not used, by itself or others, to provide any service other than cable television service. The cable company must be required to notify the utility as soon as it or others commence to offer services other than cable television. It is appropriate to impose this requirement on the cable company because it is practically impossible for a utility to know what a cable company is actually doing with its attachments. Once a cable operator falsely commences non-cable service, the utility should be able to immediately begin to charge the higher telecommunications rate for the entire cable system. In addition, the FCC should allow the utility to impose significant penalties if a cable operator falsely certifies or allows a non-cable service, utilizing its attachments, to commence without notifying the utility.

[10] Arguably an attachment that is used for services that fall outside the statutory definitions of cable service and telecommunications services is completely outside the scope of the Act and the FCC's jurisdiction.

Such penalties, exceeding the back charge for the fee difference, will create an incentive for the cable company to provide accurate information and timely notice to the utility.

B. Overlashing Requires a Separate Agreement

In discussing the "overlashing" of existing pole attachments the FCC tentatively concludes that telecommunications carriers should be permitted to overlash their existing lines with additional fiber when building out their systems. In addition, the FCC inquires whether a telecommunications carrier that overlashes its own lines should be permitted to allow third parties to use the overlashed facility. Finally, the FCC inquires whether a third party should be permitted to overlash to an existing cable system or telecommunications carriers' attachment.

EEI and UTC disagree with the FCC's tentative conclusion that telecommunications carriers should be permitted to overlash their existing lines with additional fiber absent a separate pole attachment agreement or permission from the utility. Absent the grant of specific authority to overlash in the existing pole attachment agreement all parties seeking to overlash existing facilities must be required to notify the utility and enter into a new/revised pole attachment agreement. The overlashing of existing facilities absent a valid agreement with a utility constitutes nothing less than trespass. Just as a landlord may contractually bar the subleasing of property, a pole owner continues to have the right to prevent unauthorized overlashing of existing attachments. The Act did not change this fundamental right.

Restrictions on overlashing are entirely reasonable, and will not significantly impede or delay construction of telecommunications networks. Overlashing often has a significant impact on the pole and the utility as the pole owner. An engineering analysis at the expense of the

overlasher should be completed prior to any overlashing to determine its overall impact. Overlashed facilities add to the weight and overall surface area on which ice and wind can accumulate, significantly adding to the poles' loading. The additional strain placed on the pole may require stronger anchors and other make–ready work that should be paid for by the overlashing entity. Overlashing impacts sag and the height for mid-span clearances. Overlashing may also violate NESC requirements on uniform positioning (Rule 220 A&D).[11] Further, utilities must have the ability to contract with and identify overlashing parties regarding such issues as liability, indemnification, and notification during emergencies or routine rearrangements. Finally, in some instances unauthorized overlashing by third parties frustrates the ability of utilities to determine whether all workers are qualified to be working within the vicinity of energized primary lines.

Utilities are constantly finding unauthorized overlashing that have been improperly engineered or violate safety or codes and standards. Here are a couple of examples of the real world problems with unauthorized overlashing:

- A cable television system installed a sixth cable – a fiber optic cable – by lashing it to the messenger. This installation was made without approval of or consultation with the utility pole owner. This fiber optic cable was installed solely for a dark fiber lease to an affiliated CLEC. Where the line crossed a state highway at an intersection (6 travel lanes and 2 turn lanes) an anchor was pulled up out of the ground. The pole leaned causing all of the wires on the pole to sag lower. The lowest communications wires sagged to within 5 feet of the pavement and the state highway was closed for over 3 hours during the evening rush hour.

- A cable television system installed a third coaxial cable by lashing it to the messenger. This installation was made without approval of or consultation with the utility pole owner. This line was a service drop to a restaurant crossing a restaurant parking lot. A utility owned anchor was pulled up out of the ground and the cable television cable sagged low over the restaurant parking lot. A truck caught the cable television line and the pole was pulled over and broken. The electric line and transformer bank

[11] This allows for standardized vertical spacing between horizontal wires.

> supported by the pole came down across parked cars. Fortunately no one was killed or injured, but one car was destroyed and three others damaged. The cable television operator was unable to explain the need for three coaxial cables to serve the one restaurant customer or its failures to guy its cable and contact the utility pole owner regarding the overlash despite contractual agreements to do so.

The overlashing party must be required to pay the full attachment rate to the utility because the overlashing party benefits from the existence of the pole in the same manner as any other attaching entity. It must be borne in mind that all regulated pole attachments carry implicit subsidies by utility customers to cable and telecommunications companies and these companies should not be able to avoid their minimum contributions to utilities and their consumers. Further, cable and telecommunications companies should not be able to achieve a windfall by marketing their subsidized attachment rates to other telecommunications entities at market rates.

In addition, a separate attachment fee for overlashed facilities is appropriate because the additional loading of overlashing impacts all attaching entities and may cut short the designed useful life of the pole. Because overlashing places additional strain on a pole, its existence may require a subsequent attacher or the utility to replace the pole earlier than would otherwise be necessary, and in this instance is no different than an additional separate attachment and should be treated as such. An assessment of an additional fee for overlashing is also consistent with the FCC's previous determination in the *First Report and Order* in Docket 96-98 implementing the Act's right-of-way access provisions. There the Commission noted that utilities are compelled to allow a party to maximize usable capacity by permitting overlashing, rather than requiring the placement of a larger pole (with its attendant increased costs) in order to accommodate a new attachment. Since overlashing is an alternative to putting in a larger pole to accommodate an additional attachment, clearly the overlashment itself must be treated as a separate attachment.

Each entity subject to an attachment fee as a result of overlashing should be counted as a separate attaching entity for purposes of determining the allocation of the non-usable space on a pole. A common space charge would recognize that the overlashed cable puts an additional strain on the entire pole, thereby reducing the number of possible attachments to that pole. Moreover, an overlashment obtains the same benefits as all other attachments.

C. Use of Dark Fiber Within Existing Lines

The FCC seeks comment on whether a cable system or telecommunications carrier may allow a third party to use dark fiber in its original lines. The FCC also asks whether an attaching entity should be permitted to allow third parties to use dark fiber within the attaching entity's overlashed line.

With regard to the provision of dark fiber within an existing attachment generally, EEI and UTC do not believe that such activity constitutes a new attachment under the Act. Dark fiber – unlit glass lacking the associated electronics – does not constitute "telecommunications" which is defined under the Act as the transmission of information, between or among points, as specified by the user. Further, dark fiber is not typically offered directly to the public on an indiscriminate basis, and is therefore not the rendering of a telecommunications service.

However, as indicated above, when a cable company's attachment is utilized for anything other than the offering of cable services, whether by itself or others, the attachments fall outside of the cable-only rate. Accordingly, the provision of dark fiber by a cable company disqualifies it for the cable-only rate of Section 224(d). To allow otherwise would ignore the plain language of the Act, and would provide cable with a tremendous windfall and competitive advantage over other attaching entities who would not be entitled to the incremental cable rate.

VI. PRESUMPTIONS ON HEIGHT OF POLES

In our Joint Comments and Reply Comments on the Commission's *NPRM* to establish an interim rate for pole attachments, CS Docket No. 97-98, EEI and UTC argued that there is no current need to alter the presumption of an average pole height of 37.5 feet provided that individual utilities have the flexibility to demonstrate that the presumption should be changed in a specific instance. However, those comments also indicated that there has been an increase in the average height of utility poles and that it may be appropriate to increase the current presumptive pole height to 40 feet for the final pole attachment rules in 2001. EEI and UTC continue to believe that this makes sense because of the increasing utilization of larger utility poles. Moreover, EEI and UTC believe that the primary factor necessitating the use of higher poles is the dramatic increase in telecommunications attachments. Some industry analysts suggest that 10.7 million new local telephone lines will be installed by CLECS and IXCs alone by 1999.[12] However, it may be sufficient to retain the existing height presumption provided that the Commission clearly allows an individual utility to demonstrate that its poles exceed the industry average without requiring the utility to meet an exhaustive burden of proof to rebut the presumption.

In addition, EEI and UTC renew their request that utilities should be allowed to separate out poles that are less than 30 feet from poles that over 30 feet if they are able. The utility industry does not dispute the usefulness of these poles for attachments; however, there is simply a dramatic difference in the allocation of space on these poles that distorts the rate formula. For example, on poles of less than 30-feet all attaching entities generally occupy one foot of usable

[12] Report of Northern Business Information.

space. In addition, it is inappropriate to deduct for crossarms for these poles since poles of less than 30 feet rarely have crossarms.

With regard to the current presumption of usable space EEI and UTC strongly believe that the presumption should be changed from 13.5 feet to 11 feet to reflect the view (discussed more fully below) that the safety space should be allocated directly to cable and telecommunications companies or be redesignated as non-usable space.

The FCC seeks comment on an issue raised by Duquesne Light Company, which advocates that the number of physical attachments of an attaching entity is not necessarily reflective of the burden, and therefore the costs, relating to the attachment. EEI and UTC support Duquesne's contention that varying attachments place different burdens on the pole and therefore if a utility is able to track such factors it should be able to include factors addressing weight and wind loads into its calculations. In particular, EEI and UTC would support the ability of utilities to factor in the impact that the use of tightly pulled fiber optics and the practice of overlashing have had on the amount of space that is required by cable companies and other attaching entities.[13] Tightly pulled fiber and overlashing requires additional clearance space at the pole. The tightly pulled fiber needs additional space to satisfy mid-span clearances with lines that are higher on the pole and which have been designed to accommodate sag according to industry standards. Overlashing adds weight that increases the sag of the overlashed line, requiring additional height on the pole to clear lower attachments at mid-span.

[13] Section 224(e)(3) provides that the rate component for usable space is to be based on the amount of space "required" by the attaching entity, rather than the space occupied.

VII. SAFETY SPACE SHOULD BE ASSIGNED TO ATTACHING ENTITIES USABLE SPACE

EEI and UTC adamantly oppose the FCC's tentative conclusion that the 40-inch safety space emanates from a utility's requirement to comply with the NESC and should properly be assigned to the utility as part of its usable space. In point of fact, the safety space emanates from the need to protect communications workers from electric lines. It would not exist but for the presence of telecommunications cables and their workers on utility poles. If one looks at electric utility poles on which there are no attaching entities there is no 40-inch safety space.

The nonsensical argument of cable and telecommunications companies that the safety space would not be required but for the existence of the electric utility's lines turns logic on its head. If the electric utility were not on the pole, there would not be an electric utility pole in the first place. The fallacy of the FCC's presumption is demonstrated if it examines its treatment of the assignment of cost in an analogous situation regarding the placement of cages in LEC central offices to protect co-located CLEC switching equipment. The FCC requires LECs to open up their central office private property to allow the physical co-location of CLEC equipment for connection to the LEC's switches. The FCC further authorizes the placement of "cages" within the LECs facilities in order to protect the CLEC equipment that is occupying the LEC's property. The FCC does not, however, require the LEC to pay for those cages under the argument that "but for the existence of the LEC personnel in the LEC building there would be no need for a cage." Instead, the FCC correctly recognizes that the only reason for the existence of the cages is the presence of the CLEC's equipment in the LEC's central office.

The FCC itself has recognized that the NESC requires a 40 inch safety space to minimize the possibility of physical contact by employees working on cable television or

telecommunications attachments with the potentially lethal electric power lines.[14] Moreover, the FCC can no longer retreat behind the questionable logic of its past assignment of the safety space, which relied on ambiguous statutory language and vague legislative history. Unlike the prior requirement that looked to the space "occupied" by the cable attachment, new section 224(e)(3) looks at the space actually "required" by the attaching entity. While cable and telecommunications companies may not physically "occupy" the 40-inch safety space their attachments require it.[15] In contrast, electric utilities already have a safety space that is allocated between their primary cables and their secondary cables that is allocated to their usable space. Electric utilities do not require any additional space.

Another argument that the FCC has historically relied upon is that utilities should be charged for the safety space because they place utility related devices in this space. While it is true that some utilities make some limited use of the safety space for appurtenant attachments (as do others), the safety space is not usable by utilities for horizontal spans of wire and it is not required by their physical occupation on their own poles. Cable companies and telecommunications companies frequently make creative use of the space below the communications space and yet this has never been considered usable space that should be assigned to these entities.

The final argument that the FCC has relied upon in the past to justify the allocation of the safety space to the utility industry is that a cable company pays for the safety space when it pays the make-ready charges. However, this argument is also no longer applicable because new

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[14] *Second Report and Order,* 72 FCC 2d at 69-70.

[15] The 40-inch safety space also helps to reduce the operating costs of telecommunications providers since they do not need to pay the higher costs of hiring electrically qualified workers.

section 224(i) requires all costs to be paid by any entity who requires facilities to be rearranged to accommodate an additional attachment.

If the FCC does not assign the safety space to the usable space of cable and telecommunications companies, it should at a minimum, consider it as "other than usable space" and be apportioned equally among all of the attaching entities. Such an approach recognizes that the safety space benefits all users of the pole – attaching entities and owners alike. Since the space would add to the total amount of non-usable space its costs would still be borne in part by the utility due to its statutory allotment of 1/3 of the non-usable pole costs. Such an approach would also reconcile the inconsistent treatment of cable and telecommunications use of non-usable space referenced above.

VIII. ALLOCATION OF OTHER THAN USABLE SPACE

A. Only "Attaching Entities" Should Be Counted When Allocating Non-Usable Space

In implementing the 224(e)(2) requirement of an equal apportionment of two-thirds of the costs of providing non-usable space among all attaching entities, the FCC proposes that each telecommunications carrier, cable operator or LEC attaching to a pole be counted as a separate entity, and that such costs be apportioned equally among all such attaching entities.

EEI and UTC support the FCC's common sense reading of the statute, and agree that it is correct to equally apportion the costs of common space among all attaching entities. However, as discussed below, because ILEC are not "attaching entities" under the statute it is appropriate that they not be counted in the two-thirds apportionment.

EEI and UTC also agree with the FCC's conclusion that the apportionment of common costs is expressly limited to those entities obtaining pole attachments to provide